DEC 15 1976

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-708

FIREMAN'S FUND INSURANCE COMPANY,
Petitioner,

versus

VIDEFREEZE CORPORATION and DAVID E. CHINNERY DEVELOPMENT CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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INDEX

Page

Statement of the Case 1

Argument 3

1. The Court of Appeals did not apply the "any evidence rule" in reversing the trial court's judgment notwithstanding the verdict; rather it properly applied the "reasonable man test" conceded by the petitioner to be correct 3

2. This is not an appropriate case for application of the "physical facts rule" 9

3. The Court of Appeals' construction of Dr. Murphy's testimony was correct, and surely a permissible construction that could have been made by the jury 13

Conclusion 15

TABLE OF AUTHORITIES

Cases:

Bertot v. *School Dist. No. 1*, 522 F.2d 1171 (10th Cir. 1975) 7

Brady v. *Southern R. Co.*, 320 U.S. 476 (1943) 6

Burchill v. *Kearney-National Corporation, Inc.*, 468 F.2d 384 (3d Cir. 1972) 3,4,5,6

Colna v. *Northern Metal Co.*, 242 F.2d 546 (3d Cir. 1957) 11

Denneny v. *Siegel*, 407 F.2d 433 (3d Cir. 1969) 7,8

Hohmann v. *Packard Instrument Co.*, 471 F.2d 815 (7th Cir. 1973) 7

McDonald v. *Ford Motor Co.*, 42 Ohio St. 2d 8, 326 N.E.2d 252 (1975) 11

TABLE OF AUTHORITIES (Continued)

Page

O'Conner v. *Pennsylvania Railroad Co.*, 308 F.2d 911 (2d Cir. 1962) 11

Solomon Dehydrating Co. v. *Guyton*, 294 F.2d 439 (8th Cir. 1961) 10

Warner v. *Billups Eastern Petroleum Company*, 406 F.2d 1058 (4th Cir. 1969) 6

Wylie v. *Ford Motor Co.*, 502 F.2d 1292 (10th Cir. 1974) 6

Zarzaur v. *United States*, 493 F.2d 447 (5th Cir. 1974) 7

Zollman v. *Symington Wayne Corp.*, 438 F.2d 28 (7th Cir. 1971) 10

Other Authorities:

9 Wright and Miller, *Federal Practice and Procedure* §2524 at p. 547 7

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STATEMENT OF THE CASE

Except for the petitioner's summary of the course of proceedings in the Courts below as set forth in petitioner's "Statement of the Case" (Pet. pp. 3-8), we cannot accept the petitioner's factual statements either in that section of its petition or in the following section labeled "The Evidence" (Pet. pp. 8-33) as being a fair summary of the evidence. Indeed, it is hardly

less distorted than the doggerel (Pet. pp. 34-38) composed by a clerk in the petitioner's law firm, who was a law clerk for the trial judge whose grant of judgment notwithstanding the jury's verdict was reversed by the Court of Appeals for the Third Circuit.[1] We do not, however, require a lengthy statement of our own to correct the petitioner's distortions point by point. Instead, we refer to Judge Rosenn's succinct review of the evidence on which he relied in determining that there was sufficient evidence adduced to make a judgment notwithstanding the verdict improper (Pet. App. pp. 34a-37a).

Neither Judge Rosenn nor we deny that there was conflicting evidence from which the jury *could* have reached a contrary verdict. The jury, however, exercised its proper function in weighing the conflicting evidence to reach a verdict for the respondents, and the Court of Appeals for the Third Circuit correctly determined that a proper adherence to the standards governing the entry of a judgment notwithstanding the verdict mandated viewing the respondents' evidence as reasonably supporting the inference that a small, unrecorded, and ordinarily harmless earthquake caused an unusually weakened cliff to slide.

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1 We will not waste this Court's time or our own by attempting to respond in kind to this drivel. Sup. Ct. Rule 23(4).

ARGUMENT

1. The Court of Appeals did not apply the "any evidence rule" in reversing the trial court's judgment notwithstanding the verdict; rather it properly applied the "reasonable man test" conceded by the petitioner to be correct.

The petitioner seeks to fabricate a conflict of decisions within the Court of Appeals for the Third Circuit and between that Court and the Courts of Appeals of other Circuits and this Court with regard to the proper standard to be applied to motions for directed verdicts and motions for judgments notwithstanding the verdict. The petitioner then asks this Court to grant certiorari to resolve this illusory conflict.

No such conflict exists.

Moreover, the Court of Appeals for the Third Circuit in this case applied the standard that the petitioner itself asserts is the correct standard.

The petitioner asserts that in *Burchill* v. *Kearney-National Corporation, Inc.*, 468 F.2d 384 (3d Cir. 1972), and in the case now under consideration the Court of Appeals for the Third Circuit applied what the petitioner calls the "any evidence rule". This rule, according to the petitioner, conflicts with the correct "reasonable man test" applied by the Third Circuit in the four cases cited by the petitioner on page 42 of its petition and with decisions of this Court and other Circuits cited by the petitioner on pages 40-41 of its petition.

The Court in the *Burchill* case did indeed employ the words "any evidence" at one point in its opinion reversing the trial court's entry of a directed verdict for the defendant. The petitioner quotes the one sentence from the *Burchill* opinion containing those words at page 41 of its petition. The context in which the statement appears, however, is as follows:

> "At the end of the entire case the district court in the presence of the jury ruled:
>
> 'As the trial judge I have to conclude that the plaintiff has not made out his case by a fair preponderance of the evidence. That is, that there was a defect at the time it was sold to Pennsylvania Electric Company.' (209-10a).
>
> "If, as appears on its face, this ruling represented a weighing of the preponderance of the evidence by the trial court, it was a usurpation of the function of the jury. It was for the trier of the facts to determine the preponderance of the evidence so long as any evidence supported the plaintiff's theory of the case. In a memorandum on the appellant's motion for a new trial, however, the district judge concludes:
>
> 'There is thus presented a record in which there is simply no evidence of a defect at the time the cast iron part was furnished to Pennsylvania Electric Company, nor is there any evidence that it was dangerous to the ultimate user at the time it was furnished or sold.' (247a).
>
> "Arriving at this conclusion the court ignored certain parts of the testimony that tend to cast doubt on the appellant's contention that the T fitting broke first. No reference is made, however, to the evidence referred to above tending to establish that fact, to the plain evidence in the photographic exhibits of internal oxidation in the cross section where the T fitting broke, or to the extended evidence of observations of the condition of the T fitting made immediately after the accident." (468 F.2d at pp. 386-387)

The foregoing discussion followed two pages in which the Court had reviewed at length the evidence referred to in the last sentence of the discussion quoted above. It is quite apparent from the opinion that the Court regarded the evidence in support of the plaintiff's position as very substantial.

Thus the essential issue in dispute in the *Burchill* case was not the *quantum* of evidence supporting the plaintiff's position; everyone seems to concede the existence of the substantial body of such evidence discussed by the Court of Appeals as to the defective condition of the fitting. Rather, the essential issue in that case was whether that substantial body of evidence dealt with its condition at the time of sale or at a later time. See the dissenting opinion of Judge Van Dusen at pp. 387-389.

The issue of whether the proper standard to be applied to motions for a directed verdict is the "any evidence rule" or the "reasonable man test" was not even raised in the *Burchill* case; and the Court's mere use of the words "any evidence" in the context described cannot be said to represent a considered choice between the two standards that would create a conflict with the strong line of cases in which the same Circuit has applied the standard supported by the petitioner.[2]

Moreover, nowhere in the case now under consideration were the words "any evidence" even used. Judge Rosenn did cite the *Burchill* case but only as one of several cases supporting his statement that:

> "* * * At least two factors are outside the perimeters of either court's review — the credibility of the evidence and the weight of it. *Brady* v. *Southern R. Co.*, 320 U.S. 476, 479-80 (1943); *Wylie* v. *Ford Motor Co.*, 502 F.2d 1292, 1294 (10th Cir. 1974); *Burchill* v. *Kearney-National*, 468 F.2d 384 (3d Cir. 1972)." (Pet. App. p. 33a)

Judge Rosenn certainly did not cite it in support of the "any evidence rule". Thus, even if the *Burchill* case might be said to create a conflict (which we do not concede), it is fantasy to suggest that Judge Rosenn in the

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2 A similar analysis of *Warner* v. *Billups Eastern Petroleum Company*, 406 F.2d 1058 (4th Cir. 1969) (cited on p. 41 of the petition), will disclose that except when a single sentence is quoted out of context no supportable argument can be made that the case represents a reasoned adoption of the "any evidence rule" and a rejection of the "reasonable man test". However, since the *Warner* case was neither cited nor relied on by the Court of Appeals for the Third Circuit in this case, we refrain from setting forth that analysis at length.

case now under consideration in any way perpetuated such conflict.

The Petitioner cites Wright and Miller's criticism of the "any evidence rule", but the petitioner studiously avoids any mention of the fact that Wright and Miller equate that rule with the "scintilla of evidence rule":

> "* * * Some cases still say that the evidence is sufficient if there is any evidence supporting a party's case. This is incorrect, because the federal courts require more than a scintilla of evidence to go to the jury. * * *" 9 Wright and Miller, *Federal Practice and Procedure* §2524 at p. 547.

The petitioner's reluctance to acknowledge that the two rules are the same no doubt follows from the fact that Judge Rosenn clearly and explicitly rejected the "scintilla of evidence" rule in this case:

> "A 'mere scintilla' of evidence, in federal courts, is not enough to warrant submitting a case to a jury. *E.g.*, Bertot v. School Dist. No. 1, 522 F.2d 1171, 1175 (10th Cir. 1975); Zarzaur v. United States, 493 F.2d 447, 452 (5th Cir. 1974); Hohmann v. Packard Instrument Co., 471 F.2d 815, 819 (7th Cir. 1973); Denneny v. Siegel, 407 F.2d 433, 440 (3d Cir. 1969)." (Pet. App. p. 37a, n. 6)

Thus, contrary to what the petitioner asserts, there was no clear-cut application of the "any evidence rule" by Judge Rosenn. Indeed, it was not applied at

all. By explicitly rejecting the "scintilla of evidence rule" the Court also rejected the "any evidence rule".

Moreover, a careful reading of Judge Rosenn's opinion makes clear that he applied the "reasonable man test" — the very test that the petitioner supports as the correct and proper test to be applied. Judge Rosenn said:

> "Moreover, conflicting evidence which could *reasonably* lead to inconsistent conclusions will not justify a judgment notwithstanding the verdict or a directed verdict. * * *" (Pet. App. p. 33a; emphasis added.)

* * * * *

> "Finally, our own reading of the record in this case convinces us that there was sufficient evidence adduced to make a judgment notwithstanding the verdict improper. In the words of *Denneny v. Siegel*, 407 F.2d 433, 439 (3d Cir. 1969), we cannot say (as a matter of law) that the record is deficient of that 'minimum quantum of evidence from which a jury might *reasonably* afford relief' to the insureds." (Pet. App. p. 34a; emphasis added.)

* * * * *

> "Thus, we hold that the testimony of defendants' experts provided evidence beyond a 'mere scintilla' and created a jury question as to the cause of the rockslide and hence of

> defendants' losses. * * * A proper adherence to the standards governing the entry of a judgment notwithstanding the verdict would mandate viewing defendants' evidence as *reasonably* supporting the inference that a small, unrecorded, and ordinarily harmless earthquake caused an unusually weakened cliff to slide." (Pet. App. p. 37a; emphasis added.)

There is no conflict within the Third Circuit. There is no conflict between the Third Circuit and other Circuits. There is no conflict between the Third Circuit and this Court. Thus the petition should be denied.

2. This is not an appropriate case for application of the "physical facts rule".

We do not question that the "physical facts rule" is widely accepted; nor do we quarrel with the statements of the rule in the authorities cited by the petitioner on page 47 of the petition. But the authorities cited by the petitioner do not support its application to this case. A review of the authorities will show that, although the words "scientific facts" or "principles established by the laws of science" are sometimes included in statements of the physical facts rule", the rule is applied to simple physical facts, not to complex scientific theories however widely accepted. Where scientific facts are involved, it is usually something such as "unsupported objects fall", "water wets", or "if one looks, one sees".

More often, the rule is recognized but found to be inapplicable on the grounds that, where there is a dis-

pute about what the physical facts show, conclusions are for the jury. As stated by then-Circuit-Judge Blackmun in *Solomon Dehydrating Co.* v. *Guyton*, 294 F.2d 439 (8th Cir. 1961):

> "We are aware * * * that testimony which is in conflict with undisputed physical facts is not entitled to credence [citing cases]. But we are also aware * * * that where there is reasonable dispute as to what the physical facts show, conclusions to be drawn therefrom are for the jury, * * *" (pp. 441-442)

None of the cases cited by the petitioner on page 47 of the petition involves anything as complex as the scientific theories of earthquakes, where even the most knowledgeable experts must speculate about what happens deep within the earth in order to attempt to explain symptoms felt on the surface. Of the four cases cited by the petitioner, only two clearly applied the "physical facts rule", and the circumstances of those cases are not even remotely comparable to the case now under consideration.

Zollman v. *Symington Wayne Corp.*, 438 F.2d 28 (7th Cir. 1971), involved a mechanical device that could be exactly duplicated in repeated tests conducted by experts for both parties. Although applying the rule in those circumstances, the Court recognized that its application had to be limited to situations in which there could be no variable factors diminishing the persuasiveness of the physical facts. In the case now under consideration, on the other hand, the expert witnesses expressed widely varying opinions on whether

the collapse of the cliff was caused by the earthquake felt by the lay witnesses.

In *O'Conner* v. *Pennsylvania Railroad Co.*, 308 F.2d 911 (2d Cir. 1962), the plaintiff testified that the snow on which he slipped and fell was not the result of a snowfall raging at the time. The Court held that such testimony could not prevail against weather bureau records showing a snowfall of nine inches with two-foot drifts during the hours preceding the incident. In that case, however, there was no expert testimony that the records could show such a snowfall if none had occurred. On the other hand, in the case now under consideration experts for both parties agreed that an earthquake could have occurred in St. Thomas without showing up on the records of the Cayey, Puerto Rico, seismograph. Thus, there was not the same inconsistency here between the record and the witnesses' testimony as was present in the *O'Conner* case.

The third case cited by the petitioner, *Colna* v. *Northern Metal Co.*, 242 F.2d 546 (3d Cir. 1957), stated but did not apply the "physical facts rule", holding that the rule can be applied only to clear cases of "incontrovertible physical facts". In any other case, the issue must properly go to the jury.

Finally, in the other case cited by the petitioner, *McDonald* v. *Ford Motor Co.*, 42 Ohio St.2d 8, 326 N.E.2d 252 (1975), only one of three judges applied the "physical facts rule". Another, while concurring in the result, would not have applied the rule to the facts of that case. The third judge, who dissented both from

the result and from the application of the rule, made a comment that could well be applied with only minor changes to the case now under consideration:

> "In addition, when it takes four experts several hours of testimony to explain the physical facts in issue, this does not seem to be the type of evidence which is ever capable of *positively* contradicting the testimony of eyewitnesses. This case is not the simple 'dog tracks in the mud,' it involves a complex piece of machinery which shows evidence of having fallen out of its mounting. When it fell out, or why, could not be conclusively shown by 'experts' in order to refute the testimony of eyewitnesses that it fell out prior to the crash." (p. 259)

The case now under consideration involved a complex geological structure affected in an uncertain way by past quarrying, recent rainfall, and a mild but clearly felt earthquake. Judge Rosenn put the petitioner's evidence in its proper perspective when he said:

> "Moreover, much of the uncontradicted evidence of the insurance company tended to establish the proposition that the hill was weakened by water saturation caused by the extraordinary rains and prior quarrying activities and that the strata sloped in such a manner as to facilitate rockslides. This evidence cuts both ways as it allows both the inference that water saturation caused the slide and the inference that, although an unrecorded quake would ordinarily be insufficient to set off a slide, the cliff was so prone to slide that even a small tremor could trigger it." (Pet. App. p. 37a)

Where the petitioner's own expert opinion evidence "cuts both ways", the Court was not faced with a situation of clear physical facts or incontrovertible scientific principles, and there was no error in not applying the "physical facts rule". Certainly nothing in the Court of Appeals' approach to this issue calls for correction by this Court.

3. The Court of Appeals' construction of Dr. Murphy's testimony was correct, and surely a permissible construction that could have been made by the jury.

The petitioner persists in making the same closing argument to this Court that it made to the jury (which rejected it immediately after having heard the testimony) and repeated a week later to the trial judge (who accepted it without having a transcript available) and repeated again to the Court of Appeals (which rejected it after carefully reviewing the transcript).

The petitioner's argument erroneously asserts that the respondents' expert witness said there was only one chance in 1,000 that an earthquake caused the rockfall. Although that was not what Dr. Murphy said, the petitioner's effort to convince the jury that that was what Dr. Murphy meant was a sound jury argument. To continue repeating that argument as a

ground for overturning the jury's verdict, however, is not sound. Again, Judge Rosenn put it in its proper perspective when he said:

> "We believe this is an unfair reading of Dr. Murphy's testimony, *particularly being mindful of the admonition to make every reasonable inference in favor of the defendants.* We construe the remarks as an abstract, generalized discussion of what distinguishes a 'probability' from a 'possibility.' Dr. Murphy was merely stating his view in light of the limited alternatives offered that, when the chances of an event's occurring are 1 in a thousand rather than 1 in 10,000 it is proper to term that event a 'probability' rather than a 'possibility.' At no time was he asked what the odds were as regards this particular event. For all the cross-examination indicates, Dr. Murphy might well have considered the probability that an earthquake caused the rockslide just short of a certainty." (Pet. App. p. 36a; emphasis added.)

Although the petitioner's termination of its cross-examination at that point may have left Dr. Murphy's testimony open to more than one permissible interpretation, the petitioner cannot complain if the jury drew one permissible inference rather than another. That is the jury's proper function. Nor should the petitioner expect this Court to intervene when the Court of Appeals with reason simply allows the jury's entirely proper conclusion to stand.

CONCLUSION

Most of the petitioner's arguments to this Court — like those to the Court below — turn simply on the petitioner's partisan interpretation of the sharply conflicting evidence. The Court of Appeals reviewed the petitioner's arguments under proper legal standards and found them wanting. Even if this Court suspected that, on full review, it might disagree with the Court of Appeals' application of those correct standards to the evidence in this case (which we do not concede), there are no special or important reasons, no conflicts with other Circuits or with decisions of this Court, and no departures from accepted procedures, that would merit this Court's full review. The petition for a writ of certiorari should be denied.

Dated: December 14, 1976.

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